



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-H-C-P-, INC.

DATE: FEB. 1, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of health care personnel, seeks to employ the Beneficiary as a registered nurse. It requests her classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree followed by five years of experience, for lawful permanent resident status.

The Director of the Texas Service Center denied the petition and the Petitioner's following motion to reopen. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this and other petitions.

On appeal, the Petitioner submits additional evidence and asserts that a totality of the circumstances demonstrates its ability to pay the combined proffered wages.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration usually follows a three-step process. First, to permanently fill a job in the United States with a foreign national, an employer must obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). If the DOL certifies an offered position, an employer must then submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, the foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

The DOL, however, has determined that the United States lacks able, willing, qualified, and available nurses, and that employment of foreign nationals in this "Schedule A" occupation will not hurt the wages and working conditions of U.S. workers with similar jobs. 20 C.F.R. § 656.5. Thus, the DOL has authorized USCIS to adjudicate certification applications for nurses. 20 C.F.R. § 656.15(a). Here,

USCIS therefore rules not only on the petition but also on the accompanying labor certification application.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence (LPR).¹ 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full annual proffered wage. If a petitioner did not pay the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay. *See Matter of Sonogawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).²

Here, the accompanying labor certification application states the proffered wage of the offered position of registered nurse as \$73,000 a year. As of the appeal's filing, required evidence of the Petitioner's ability to pay the proffered wage in 2017 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2016, the year of the petition's filing date.

The Petitioner submitted a copy of a paystub indicating that, as of November 2016, it paid the Beneficiary \$12,884.13 that year. This amount does not equal or exceed the annual proffered wage of \$73,000. Based on payments to the Beneficiary, the record therefore does not establish the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments to the Beneficiary. It need only demonstrate its ability to pay the difference between the annual proffered wage and the amount it paid the Beneficiary, or \$60,115.87.

On appeal, the Petitioner submits copies of its federal income tax returns for 2016, reflecting net income of \$45,901 and net current assets of \$266,579. The tax returns do not indicate sufficient net income to cover the \$60,115.87 difference between the annual proffered wage and the wages paid to the Beneficiary. Based on net income, the record therefore does not establish the Petitioner's ability to pay. But the net current assets reflected on the returns exceed the wage difference.

As the Director found, however, USCIS records indicate the Petitioner's filing of multiple Forms I-140, Immigrant Petitions for Alien Workers. A petitioner must demonstrate its ability to pay the

¹ This petition's priority date is April 14, 2016, its filing date. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date, or filed thereafter. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming revocation where, as of the petition's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple pending and filed petitions).

In response to the Director's request for evidence (RFE), the Petitioner provided information regarding 78 petitions that it filed as of its response, identifying the beneficiary, priority date, and offered wage of each petition. The list indicated that: five beneficiaries obtained LPR status; one petition was denied; and one beneficiary had resigned.³ The Petitioner did not provide statuses of the other 71 petitions or indicate its payment of wages to any of these 71 beneficiaries.⁴ The Director found that: the annual proffered wages for the 71 beneficiaries averaged approximately \$60,000; their combined proffered wages totaled more than \$4 million; and the Petitioner did not establish its ability to pay the combined proffered wages of these beneficiaries based on its net income or net current assets.

On appeal, the Petitioner does not supplement the record with any additional evidence of wages paid to any of the 71 beneficiaries of its other pending or approved Form I-140 petitions. Rather, the Petitioner argues that its business has grown and submits a compilation report from a certified public accountant (CPA) with financial statements, including a balance sheet as of June 30, 2017, and statements of income, changes in stockholders' equity, and cash flows for the six-month period from January 1 to June 30, 2017. As stated in the compilation report, however, the CPA did not audit the financial statements. The CPA further stated that "[m]anagement has elected to omit substantially all of the disclosure required by accounting principles generally accepted in the United States of America." Thus, the financial statements do not comply with 8 C.F.R. § 204.5(g)(2), which requires "audited financial statements." Audits comply with standards reasonably assuring that financial statements lack material misstatements. Not meeting this standard, the unaudited financial statements submitted by the Petitioner are unreliable evidence of the company's overall financial condition or ability to pay the proffered wage.

As previously indicated and as the Petitioner argues on appeal, we may consider evidence of a petitioner's ability to pay a proffered wage beyond its payments to a beneficiary and its net income and net current assets. Under *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay.

³ The Petitioner must submit evidence that it withdrew the I-140 petition for the resigned beneficiary. Without a withdrawal, we will consider the wages owed to this beneficiary as part of the Petitioner's overall wage burden.

⁴ USCIS records show that, after its RFE response, the Petitioner continued to file I-140 petitions. In any future filings, the Petitioner must submit the required information for each additional petition that was pending or approved as of this petition's April 14, 2016, priority date, or filed thereafter.

Here, the record indicates the Petitioner's establishment in 2012 and its claimed employment, as of the petition's filing, of 23 people. Copies of the Petitioner's federal income tax returns indicate that, from 2015 to 2016, its total annual income increased. On appeal, the Petitioner's unaudited financial statements show even greater growth in 2017, but their unaudited nature limits their probative value. Moreover, unlike the petitioner in *Sonegawa*, the record does not indicate the Petitioner's continuous operations for more than 10 years, its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service. Also unlike *Sonegawa*, the Petitioner here must demonstrate its ability to pay combined proffered wages of multiple petitions. Thus, a totality of the circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

For the foregoing reasons, the Petitioner has not demonstrated its continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

III. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of A-H-C-P-, Inc.*, ID# 1086198 (AAO Feb. 1, 2019)